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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH E. TODARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(11185)

QUESTIONS PRESENTED

1. Whether this Court will resolve the conflict between several federal courts of appeal as to those circumstances which require a judicial directive requiring the prosecution to obtain statutory use immunity for a prospective defense witness?

2. Does the due process clause require an order conditionally requiring the prosecution to confer statutory use immunity upon a prospective defense witness limited to a restricted topic which the prosecutor is aware of from pre-existing independent sources where the prosecution has utilized authorized and unauthorized immunity grants and where the prosecutor intends to affirmatively exploit the unavailability of the prospective defense witness?

3. Whether the Court's decision in **Holland* requires the prosecution to obtain statutory use immunity upon the otherwise unavailable sources of non-taxable income in every net worth - expenditure prosecution?

4. Whether the *Holland* "leads" obligation requires the prosecution to obtain statutory use immunity restricted to taxpayer disclosed information as to non-taxable income where the prosecution has used authorized and unauthorized immunity grants and where the prosecutor intends to affirmatively exploit the unavailability of limited defense testimony from the sources of the non-taxable income?

5. Does the district court curtailment of prosecution argument to the jury constitute the suppression or exclusion of evidence under 18 U.S.C. § 3731?

**Holland v United States*, 348 U.S. 121, 135-136 (1954).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 744 F.2d 5 and is reprinted in the Appendix, infra, at page A-1 et seq.

JURISDICTION

The Petitioner was charged in an indictment, filed in the Western District of New York, with three counts of income tax evasion and four counts of filing false tax returns. 26 U.S.C. §§7201, 7206 (1). On February 7, 1984 the District Court issued a pre-trial order which conditioned the admissibility of proffered prosecution proof and the scope of prosecutorial comment to the jury upon the prosecution's conferral of limited use immunity upon two prospective defense witnesses. The District Court order in its entirety is reprinted in the Appendix, infra, at page A-12 et seq.

On February 24, 1984 the prosecution appealed from the conditional and limited use immunity directive. cf. 18 U.S.C. §3731.

The United States Court of Appeals for the Second Circuit reversed the complained of portion of the order on September 11, 1984. The Second Circuit opinion is reprinted in the Appendix, infra, at page A-1 et seq. On October 25, 1984, the Second Circuit denied Petitioner's application for re-hearing en banc. That order is reprinted in the Appendix, infra at page A-11.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, which states that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTES AND RULES INVOLVED

Title 18 U.S.C. §3731, which provides in pertinent part:

> "An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence . . ."

In The

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No. _____

JOSEPH E. TODARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

The Petitioner was accused in a seven count indictment filed on February 10, 1983.[1] [7]. He was charged with three counts of income tax evasion in violation of 26 U.S.C. §7201 and with three counts of filing false tax returns, in violation of 26 U.S.C. §7206(1), for the three fiscal years ending June 30, 1976, June 30, 1977 and June 30, 1978. [7-13]. These six counts do not recite either the alleged amount of understated taxable income or the additional tax purportedly owed. [id.] The Strike Force will utilize the "net worth and non-deductible expenditures" method of proof as to these six counts. See *Holland v United States,* 348 U.S. 121 (1954).

[1] [ ] refers to pages of Appendix filed with the United States Court of Appeals for the Second Circuit.

The matter at bar originated with the Petitioner's receipt of non-taxable loan proceeds from John Grieco and James Ryding during the years for which he purportedly understated his taxable income.

PRE-INDICTMENT PHASE

Petitioner's indictment was preceded by an extensive investigation and proceedings before the May, 1980 special grand jury. [7]. During the pre-indictment period, eight prosecution witnesses were immunized by or on behalf of the Strike Force. Five of those witnesses received immunity pursuant to the statutory procedure set forth in 18 U.S.C. §§6002 and 6003. Doc. Nos. 14, 15, 16, 17, 18.[2] One witness was immunized under an "informal agreement" between his attorney and the prosecutor. Doc. 10.

Two other witnesses received full prosecutorial absolution in exchange for their testimony against the Petitioner. In its bargain with Joseph M. Augustine, the Strike Force agreed to waive prosecution for any violations of the Internal Revenue Code with respect to the years 1975 through 1979. [35]. The Strike Force also agreed to absolve Mr. Augustine of any potential federal charges arising from his interest in the Golden Strand Hotel which included violations of the Racketeer Influenced and Corrupt Organization Statute (18 U.S.C. §§1961-1963) and violations of the Interstate Travel in Aid of Racketeering Act (18 U.S.C. §1952). [id.] In addition, the prosecutor agreed to seek a "formal" order of "use immunity" under "18 U.S.C. 6001 et seq." that would encompass Augustine's testimony before the federal grand jury and at trial. [id.] The Augustine immunity order was signed by District Judge John T. Elfvin. Doc. 13.

The prosecutor and the attorney in charge of the Boston Strike Force made an "informal immunity" deal to procure the testi-

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[2] "Doc" references are to the numbered documents which comprise the Record on appeal to the Court of Appeals.

mony of Charles Lavine. [37-38]. According to the Strike Force, Lavine had lied to the Internal Revenue Service during an audit of his tax returns for the years 1976, 1977 and 1978. [37]. Moreover, the prosecution had evidence that Lavine had committed interstate racketeering and bookmaking offenses in violation of "18 U.S.C. 1084, 1952 and 1962". [id.]

Under the terms of this "informal immunity" deal, the Buffalo and Boston Strike Force Offices waived prosecution of Lavine both in the Western District of New York and in the District of Massachusetts. [id.]

No immunity order under 18 U.S.C. was ever issued with respect to Lavine. There is no indication that the United States Attorney for either the District of Massachusetts or the Western District of New York ever requested or was ever made aware of the "informal immunity" deal with Lavine. Similarly, there is no evidence that the Strike Force deal with Lavine was ever submitted to or approved by,

> ". . . the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General . . ." cf. 18 U.S.C. §6003 (b).

In October, 1980 a $29,000 loan repayment was made to James Ryding by way of a Liberty Bank check. Doc. 27, Ex. A, p. 2. Loan repayment including $10,000 in interest was made to John Grieco in 1981. Doc. 27, Ex. A, p. 2.

During 1981, the prosecution received information from one of its own informants as to the existence of a loan from James Ryding and Benjamin Nicoletti to the Petitioner. [64]. The prosecutor never interviewed the informant. The informant was never summoned to testify before the grand jury concerning his or her knowledge of the loan. The prosecutor refused to produce the informant for an *in camera* interview by the court. [64-65]. On one occasion, the prosecutor claimed that the informant had not ac-

quired any knowledge as to the amount of the loan. [id.] However, in a previous letter the prosecutor wrote that,

> "I am somewhat convinced that your client also borrowed about $30,000 from James Ryding" [43].

During communications with counsel, the prosecutor advised that the grand jury was investigating Petitioner's income tax liability for the fiscal years ending June 30, 1976, June 30, 1977 and June 30, 1978. [25]. The prosecutor assured counsel that the Government would,

> ". . . review, investigate and present to the Grand Jury all information supporting Mr. Todaro's insistence that he has honestly reported his taxable income." [id.]

By letter of January 4, 1982 Petitioner's counsel requested that the grand jury investigate certain "loans made to our client" during the three fiscal years "under scrutiny" [25]. The letter identified lenders John Grieco, James Ryding and Peter Marino by name and address. The letter also recited that Mr. Grieco had advanced approximately $50,000; Mr. Ryding had loaned about $30,000 and Mr. Marino furnished approximately $10,000. [id.]

The January 4, 1982 letter expressly mentioned that the prosecution had utilized immunity grants to compel testimony "in its pursuit of Mr. Todaro" [27]. The letter requested that the prosecution exercise,

> "no lesser efforts to accumulate exculpatory evidence and to verify the 'leads' supplied by the defense". [id.] See *Holland v United States,* 348 U.S. 121, 135-137 (1954).

After receipt of the January 4th letter, the prosecution subpoenaed the three lenders to appear before the grand jury. Mr. Marino appeared and testified "freely" about his loan to Petitioner. [18, 56-57]. According to the prosecutor, the Petitioner was credited with the receipt of the $10,000 loan from Mr. Marino in the prosecution's net worth computations [43].

Mr. Ryding and Mr. Grieco each invoked the Fifth Amend-

ment privilege in response to the grand jury subpoena [18]. The prosecution has steadfastly refused to initiate the statutory procedure for conferring immunity on either Mr. Ryding or Mr. Grieco.

POST-INDICTMENT PHASE

During March, 1983 the defense submitted a variety of requests for pre-trial disclosure under *Brady v Maryland,* 373 U.S. 83 (1963). [28-32]. Certain of those requests sought information and material concerning Petitioner's receipt of non-taxable income during the indictment period from any sources including Mr. Grieco and Mr. Ryding. [31-32]. In his response, the prosecutor claimed that all such "materials were previously supplied" to the defense. [33-34].

In August, 1983 the defense moved for an order directing the prosecution to confer "use immunity" upon Mr. Grieco and Mr. Ryding [15-24]. The defense also moved for the disclosure of information which corroborated the existence of the loans to the Petitioner. [id.] The district court permitted both parties to submit legal memoranda and he accepted an *in camera* submission from the prosecutor. [45]. See *United States v Turkish,* 623 F.2d 769, 778 (2nd Cir.), cert. denied 449 U.S. 1077 (1981).

On February 7, 1984 the district court issued the order which gave rise to this appeal. (A-12). In a portion of that order which has not been appealed the court found that there had been,

> ". . . apparent non-compliances with the mandates of *Brady v Maryland,* 373 US 83 (1963), and Fed. R. Crim. P. Rule 16." [id.]

The appealed from portion of the February 7th order precluded the prosecution from refuting the financial capacity of either Mr. Grieco or Mr. Ryding to make substantial loans unless the respective lender received limited use immunity for trial testimony concerning such financial capacity "or the making *vel non* of such loan or loans to Todaro." (A-12-13).

The prosecution then moved for clarification of the order. [47-50]. At the clarification proceeding, the prosecution stressed the absence of any records in its possession which documented the transfer of funds from Mr. Ryding to Petitioner. The district court expanded the application of its limited use immunity directive in the event that the prosecutor would argue that the absence of records demonstrated that Mr. Ryding did not loan the funds to Petitioner. [53-55]. However, the court indicated that evidence as to the absence of records would probably be admissible without conferring limited use immunity upon Mr. Ryding if such evidence were used for the sole purpose of showing that the prosecution had met its obligation under *"Holland v United States"*. [54-55].

During the clarification proceeding, the prosecution announced its intention to present a net worth analysis of Mr. Grieco and to argue that the analysis demonstrated that Mr. Grieco had not loaned substantial sums to Petitioner. The district court precluded the presentation of this proof unless the prosecution conferred the limited use immunity upon Mr. Grieco. [57-59].

The prosecutor's revelations regarding the informant information received in 1981 were made known to the defense only after issuance of the district court order. [64-65]; Doc. 27, Ex. A, pp. 1-3. These disclosures were presumably prompted by the district court's directive that the prosecution disclose "any and all evidence" concerning the Grieco and Ryding loans. [A-13].

On February 24, 1984 the prosecution filed a notice of appeal from the district court's limited use immunity directive. Three days later, the court stayed all proceedings pending the prosecution appeal to the court of appeals. [6, 69-70].

REASONS FOR GRANTING THE WRIT

There is a conflict among several circuit courts of appeals as to whether use immunity for a prospective defense witness is constitutionally required. In a series of decisions, the Third Circuit has held that the due process clause mandates the issuance of a judicial directive which requires the government to grant statutory use immunity upon prospective defense witnesses under penalty of dismissal if the prosecution refuses to comply.

The Third Circuit remedy is warranted where the prosecution decisions to withhold immunity,

> ". . . were made with the deliberate intention of distorting the judicial fact finding process" *United States v Herman,* 589 F.2d 1191, 1204 (1978), cert. den. 441 U.S. 913; see also *Government of the Virgin Islands v Smith,* 615 F.2d 964, 968-969 (3rd Cir. 1980); *United States v Bazzano,* 712 F.2d 826, 829, 839-840 (3rd Cir. en banc, 1983).

The Seventh Circuit has held that the prosecutor's discretionary decisions under the immunity statute are subject to judicial review under the "due process clause of the fifth amendment." *United States v Taylor,* 728 F.2d 930, 935 (1984). According to the Seventh Circuit, that discretion is abused,

> ". . . when a prosecutor intends to use his authority under the immunity statute to distort the judicial fact-finding process. *United States v Frans,* 697 F.2d 188, 191, cert. denied ____U.S.____, 104 S. Ct. 104 (1983)" *Taylor,* supra at 935.

The Ninth Circuit has expressed its agreement with the Third Circuit's distortion of the "fact-finding process" standard. *United States v Lord,* 711 F.2d 887, 891 (1983). In *Lord,* the Ninth Circuit remanded for an evidentiary hearing to determine whether the prosecutor had "deliberately" caused the prospective defense witness to invoke the "fifth amendment privilege". 711 F.2d at 891.

The Second Circuit has noted its "fundamental disagreement"

with the defense witness immunity "standards" as set forth by the Third Circuit. *United States v Turkish,* 623 F.2d at 769, 777, cert. denied 449 U.S. 1077 (1981). Moreover, any federal prosecutor within the Second Circuit can unilaterally determine the outcome of any defense witness immunity application, with absolute insulation from judicial review, by merely expressing an inclination to prosecute the prospective defense witness. *Turkish,* supra, 623 F.2d at 778.

The panel in this case stated that,

> "[w]e reiterate our view that a witness' status as an actual or potential target of prosecution always warrants summary rejection of a claim for defense witness immunity." *United States v Todaro,* 744 F.2d 5, 9 (1984).

Significantly, the use immunity directive in this case was both conditional in nature and extremely limited in scope. No immunity would have to be conferred unless the prosecutor mounted specific attacks upon the existence of the loans by presenting a net worth analysis of Mr. Grieco and by jury argument concerning the absence of records pertaining to Mr. Ryding. Even if those attacks were to occur, the prosecution could have fully complied with the directive by acquiring a statutory use immunity order confined to trial testimony as to whether or not the loans were made. Although arising in a different context, the Government has previously expressed its willingness to bestow immunity for witness responses in "a limited area". *Pillsbury v Conboy,* ____U.S.____, 103 S. Ct. 608, 631 n.12 [Stevens and O'Connor, JJ. dissenting].

In any future proceeding which might involve the witnesses, the prosecution could irrefutably establish that its knowledge about the loans had been obtained before the immunized testimony and from independent sources. The independent sources include the January 4, 1982 "leads" letter sent to the prosecutor on Petitioner's behalf, Mr. Grieco's 1981 tax return which attributed interest income from Petitioner for loan proceeds advanced

during the indictment period, from the informant information pertaining to the Ryding loan and from the prosecution's "independent investigations" which indicated that Mr. Grieco and Mr. Ryding were involved in moneylending activities [25, 43, 64-65]; Doc. 27, Ex. A, p. 2. See *Kastigar v United States,* 406 U.S. 441, 460 (1972); *United States v Bianco,* 534 F.2d 501, 511 (2nd Cir. 1976), *United States v Catalano,* 491 F.2d 268, 272 (2nd Cir. 1974), *United States v Provenzano,* 620 F.2d 985, 1006 (3rd Cir. 1980). It is self-evident that the Second Circuit panel overlooked the fact that the limited immunity directive in this case posed no threat to a prosecution of either witness. *United States v Todaro,* supra, 744 F.2d at 9.

At the clarification proceeding the respective situations of Mr. Ryding and Mr. Grieco were discussed. With respect to Mr. Grieco, the district court observed that the "unavailability" of evidence to both parties would be "fine" [58]. However, the Court was disturbed by the prosecution's intention to present the net worth analysis while it persistently refused to render Mr. Grieco's testimony about the existence of the loan available to Petitioner. [58-59]. Given the facts and circumstances of this case, which include the prosecutor's selective use of immunity grants to procure Petitioner's conviction, the district court's remedial action was the least that should have been done.

The justification for the district court directive is underscored both by the number of witnesses immunized by the prosecution and by the unauthorized transactional immunity that was bestowed upon Mr. Augustine and Mr. Lavine. Moreover, the unauthorized "informal" immunity grant for Mr. Lavine was concealed from those members of the Justice Department who were designated by Congress to supervise the immunity process. See *Earl v United States,* 361 F.2d 531, 534, n.1 [Burger, J.], cert. denied 388 U.S. 921 (1966).

This Court has mandated that the prosecution in a "net worth" case must pursue taxpayer "leads" to sources of non-

taxable income. *Holland v United States,* supra, 348 U.S. at 135-136. In this case, the prosecutor has flagrantly violated that requirement by refusing to immunize the prospective defense witnesses and by expediently ignoring the Government's own investigation which included information from one of its own informants. The prosecutor's failure to interview the informant and his refusal to present the informant's testimony to the grand jury or to produce the informant for an *in camera* interview by the court constitute a repudiation of the *Holland* mandate. The prosecutor's own admission of being "somewhat convinced" of the Ryding loan conclusively demonstrates his decision to avoid the truth and to conceal it.

The district court order held that the lending ability of Mr. Grieco and Mr. Ryding "shall be presumed". (A-12). The order was based in part upon the prosecutor's *in camera* submission. This presumption was obviously predicated upon the court's factual determination that the prosecution either actually knew that Mr. Grieco had sufficient funds or that the prosecution had violated the *Holland* mandate to negate that possibility. This conclusion is reinforced by the district court's finding of "apparent" non-compliance with *Brady v Maryland,* 373 U.S. 83 (1963). (A-12).

The district court stated that it would probably permit the prosecution to prove the absence of any records which documented the transfer of funds from Mr. Ryding to Petitioner [A48-49, 53-55]. The court observed that this proof would be permissible for the sole purpose of showing that the prosecution had attempted to meet its "leads" obligation under *Holland* [A53-55]. The court did preclude the prosecution from asking the jury to infer from the absence of such records that no loan had been made [54-55].

Although the court curtailed the scope of the prosecution's intended jury argument, it did not exclude or suppress any proffered proof pertaining to Mr. Ryding. Consequently, the order, as it related to Mr. Ryding, was not appealable cf. 18 U.S.C. §3731.

CONCLUSION

For these reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,
Appellant,

v.

Joseph E. TODARO, Defendant-Appellee.

No. 1364, Docket 84-1086.

United States Court of Appeals,
Second Circuit.

Argued June 13, 1984.

Decided Sept. 11, 1984.

Government appealed from an order of the United States District Court for the Western District of New York, John T. Elfvin, J., which precluded the introduction of certain evidence at trial in a net worth income tax evasion prosecution unless the Government granted immunity to two witnesses who, according to the defendant, could provide a source of nontaxable income for the defendant. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) order was appealable; (2) court should always deny claim for defense witness immunity when prosecutor shows, by way of indictment or ex parte in camera affidavit, the witness' status as an actual or potential target of prosecution; and (3) even if witnesses were not targets of prosecution, there was no showing that their testimony was exculpatory, material, and unobtainable from other sources.

Reversed.

George L. Hastings, Jr., Atty., Tax Div., Dept. of Justice, Washington, D.C. (Glenn L. Archer, Jr., Asst. Atty. Gen., Michael L. Paul, Robert E. Lindsay, Attys., Tax Div., Dept. of Justice, Washington, D.C., Salvatore R. Martoche, U.S. Atty., Buffalo, N.Y., on brief), for appellant.

Joseph M. LaTona, Buffalo, N.Y. (Condon, LaTona & Klingensmith, Buffalo, N.Y., on brief), for defendant-appellee.

Charles F. Crimi, Sr., David Rothenberg, Lawrence J. Andolina, Criminal Defense League, Inc., Rochester, N.Y., submitted a brief for amicus curiae Criminal Defense League.

Mark J. Mahoney, Diebold, Bermingham, Gorman, Brown & Cook, Buffalo, N.Y., Ephraim Margolin, San Francisco, Cal., Nat. Ass'n. of Criminal Defense Lawyers, Washington, D.C., submitted a brief for amicus curiae Nat. Ass'n. of Criminal Defense Lawyers.

Before FRIENDLY, VAN GRAAFEILAND, and NEWMAN, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

This is an appeal by the Government, pursuant to 18 U.S.C. §3731 (1982), from the February 7, 1984, order of the District Court for the Western District of New York (John T. Elfvin, Judge) precluding the introduction of certain evidence at trial unless the Government confers use immunity on two potential defense witnesses. Because we conclude that defense witness immunity, if ever available, was precluded by the standards set forth in *United States v. Turkish,* 623 F.2d 769 (2d Cir.1980), *cert. denied,* 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981), we reverse.

Facts

Defendant-appellee Joseph E. Todaro, Sr. was charged in an indictment with three counts of willfully attempting to evade federal income tax liabilities, in violation of 26 U.S.C. §7201 (1982), and four counts of willfully subscribing false tax returns, in violation of 26 U.S.C. §7206(1) (1982). With respect to the tax evasion counts, the Government informed the District Court and the defendant that it intended to demonstrate the defendant's unreported taxable income by using the "net worth" method of proof. *See Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954).

Prior to the filing of the indictment, Todaro advised the Government of three possible sources of non-taxable funds. Todaro

requested that the grand jury investigate loans allegedly made to Todaro by John Grieco, John Ryding, and Peter Marino in the respective amounts of $50,000, $30,000, and $10,000. After investigating these leads, the Government concluded that Marino had probably made a $10,000 loan to Todaro and accordingly credited Todaro's "net worth" calculation with the amount of the loan. However, the Government's investigation unearthed no evidence corroborative and Grieco and Ryding loans. In response to a Government request for reciprocal discovery, Fed.R.Crim.P. 16(b)(1), Todaro indicated that he had no documentary evidence substantiating the existence of the loans. When Ryding and Grieco were called to testify before the grand jury investigating Todaro, each invoked his Fifth Amendment privilege against self-incrimination and declined to answer questions regarding the loans.

On August 23, 1983, after the filing of the indictment, Todaro moved for an order "directing" the United States to obtain use immunity for Grieco and Ryding. In an accompanying affidavit, defense counsel noted that the Government had already conferred use immunity upon a number of grand jury witnesses. Without specifying the substance of Grieco and Ryding's anticipated trial testimony or the unavailability of the crux of that testimony from other sources, defense counsel simply stated that the two defense "leads" would account for "the non-taxable receipt of approximately $80,000." Defense counsel also stated that "[a]bsent an immunity grant, it appears that testimony from these individuals cannot be obtained by the defense." Relying on *Holland v. United States, supra,* defense counsel contended that the Government's duty to investigate defense leads as to the source and amount of non-taxable income encompasses the duty to confer use immunity "whenever that investigative technique is necessary to exhaust a 'lead.' " Defense counsel advanced two reasons for judicially compelled defense witness immunity. First, the "prosecution has engaged in selective use of immunity to gain a tactical advantage." Second, this selective practice amounts to a

deliberate refusal to pursue defense leads as required by *Holland v. United States, supra.* Counsel concluded that Todaro "*may be* unfairly deprived of material and exculpatory evidence" (emphasis added).

The Government opposed the request primarily on the ground that this Circuit has "uniformly rejected" requests for defense witness immunity. It also noted that Todaro failed to supply *any* evidence indicating the existence of the loans or to make any proffer that the witnesses would testify if immunized and what their testimony would be. Further, the Government emphasized the absence of an affidavit of Todaro indicating the particulars surrounding the loans. Most notably, the Government submitted to the District Court, *in camera,* an affidavit of the prosecutor indicating the extent of the then existing evidence of possible criminal activity by each of the prospective defense witnesses and representing that any grant of immunity to either witness might impede future prosecutions.

On February 7, 1984, without making any factual findings, the District Court summarily ordered that, because there existed "conflicting factors of fairness" and "matters of third persons' privacy and confidentiality,"

> it shall be presumed for purposes of this trial that each of Greico [*sic*] and Ryding and Marino was financially able at all pertinent times to have made a substantial loan or loans to Todaro and that the government may not adduce any evidence showing or tending to show that Greico [*sic*] or Ryding or Marino was at any pertinent time financially unable to have made a substantial loan or loans to Todaro unless Greico or Ryding or Marino shall respectively have been accorded use immunity as to testimony on trial concerning such ability or the making *vel non* of such loan or loans to Todaro . . .

At the Government's request, the District Court held a hearing to clarify the effect of its order. In response to the Government's representation that Marino had freely testified before the grand

jury, had never indicated an intent to invoke his Fifth Amendment privilege, and that Todaro never requested immunity for Marino, the District Court withdrew the order with respect to Marino. However, in response to the Government's asserted intent to introduce at trial evidence that it had investigated the alleged Grieco and Ryding loans and was unable to find evidence substantiating their existence, the District Court stated:

> Now, that carries with it, of course, an implication that there was nothing [*i.e.*, no loans], which is why the Government is going to put it in. If it is put in merely to show that the Government has carried out the burden imposed upon it by Holland versus United States, namely to follow up leads such as that given to the Government by the defendant, that's one thing. And if it is limited to that purpose and constrained to that use by the jury, it is probably all right. If there is going to be some attempt to have the jury infer from that that there was not the loan, then you are into the area covered by my Order.

[1] When asked whether the Government could present proof that, although Grieco had ample financial means, his funds were tied up so that he lacked the cash flow to finance the loan in question, Judge Elfvin further clarified his order by agreeing with the prosecutor's interpretation that it required the Government "to abstain from the evidence with respect to Mr. Grieco entirely." Both sides understand this statement to apply equally to Ryding. The Court's rationale appears to have been that since Grieco and Ryding's testimony was then equally unavailable to both sides, fairness considerations preclude the Government from establishing, in an inferential fashion, the non-existence of the loans, when it had the statutory authority to resolve the uncertainty by extending use immunity to the witnesses. We think the Government fairly summarizes the effect of the District Court's order: "absent a grant of immunity, [the Court] will not permit the Government at trial to introduce any evidence for the proposition that the alleged loans did not occur, nor ask the jury to infer from

any evidence that the loans did not occur." Brief for Appellant at 6. From this ruling, the Government appeals.[1]

Discussion

In *United States v. Turkish, supra,* this Court considered both substantive and procedural aspects of a defendant's request to have use immunity conferred upon defense witnesses who invoke their privilege against self-incrimination.[2] We first noted that this Circuit had "uniformly rejected" requests for defense witness immunity.[3] After rejecting the compulsory process clause of the Sixth Amendment as a constitutional basis for defense witness immunity, we explored the possibility that such immunity might arise from the requirement of basic fairness protected by the Fifth Amendment's Due Process Clause. We rejected the view that fairness considerations, without more, require equal availability of use immunity for prosecution and defense witnesses.

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[1] This Court has jurisdiction, pursuant to 18 U.S.C. § 3731, over this appeal from what amounts to a conditional order excluding evidence. *See United States v. Horwitz,* 622 F.2d 1101, 1104-05 (2d Cir. 1980), *cert. denied,* 449 U.S. 1076, 101 S.Ct. 854, 66 L.Ed.2d 799 (1981).

[2] Todaro suggests that the principles set forth in *Turkish* are not applicable to an order that merely conditions the admission of evidence and argument to the jury on the grant of use immunity to potential defense witnesses. We have previously ruled, however, that the same reasons that weigh against requiring a grant of immunity also apply when the grant is a condition of admitting evidence. *See United States v. Horwitz, supra,* 622 F.2d at 1105.

[3] In the wake of *Turkish,* this Court has regularly upheld district court denials of requests for defense witness immunity, *United States v. Calvente,* 722 F.2d 1019, 1025 (2d Cir. 1983); *United States v. Burns,* 684 F.2d 1066, 1077-78 (2d Cir. 1982), *cert. denied,* 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983), and has remanded for reconsideration in light of *Turkish* a district court order suppressing testimony of government-immunized witness unless use immunity granted to a defense witness. *United States v. Horwitz, supra,* 622 F.2d at 1105-06, *remanding United States v. De Palma,* 476 F.Supp. 775 (S.D. N.Y. 1979). *See also Grochulski v. Henderson,* 637 F.2d 50, 52-53 (2d Cir. 1980) (similar claim raised in federal habeas attack upon state criminal conviction), *cert. denied,* 450 U.S. 927, 101 S.Ct. 1383, 67 L.Ed.2d 358 (1981). *But see United States v. Smith,* 17 M.J. 994 (A.C.M.R. 1984).

However, reluctant to rule out the possibility that some exceptional circumstances might warrant defense witness immunity, we said: "Without precluding the possibility of some circumstances not now anticipated, we simply do not find in the Due Process Clause a general requirement that defense witness immunity must be ordered whenever it seems fair to grant it." 623 F.2d at 777.

[2,3] *Turkish* also reckoned with the implications of defense witness immunity upon the division of responsibilities between judges and prosecutors. Mindful of the substantial risks to potential future prosecutions inherent in grants of use immunity, we emphasized that such risks "are matters normally better assessed by prosecutors than by judges." *Id.* at 776. To avoid intruding into the sphere of prosecutors and to spare district courts the burden of holding needless hearings, we explicitly set forth guidance that should have been dispositive of the claim in this case:

> Trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution. No hearing should be held to establish such status. The prosecutor need only show that the witness has been indicted or present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity. No duty is imposed upon the prosecutor; he simply has an option to rely upon the witness's status as an actual or potential target of prosecution to foreclose any inquiry concerning immunity for that witness.

Id. at 778.[4] The Government here made the necessary showing under *Turkish* to foreclose any further inquiry into the propriety of defense witness immunity.

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[4] As the D.C. Circuit has noted, this passage obviously does not mean that "the government must grant immunity in every case unless the witness is 'an actual or potential target of prosecution.' " *United States v. Heldt*, 668 F.2d 1238, 1283 n. 85 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982).

[4] Even if the witnesses had not been prosecution targets, Todaro's claim for defense witness immunity should have been summarily rejected for lack of a sufficient showing that the witnesses' testimony is clearly exculpatory, material, and unobtainable from other sources. *Id.* Defense counsel's affidavit accompanying the motion was patently insufficient to satisfy these requirements. There is no indication of what the witnesses could be expected to testify about at trial. Nor does the affidavit state whether evidence of the alleged loans is unavailable from other sources and whether the two witnesses would testify if immunized.

This Circuit has had no occasion since *Turkish* to consider what "exceptional circumstances," if any, might warrant a grant of defense witness immunity. Todaro contends that this case presents such circumstances and invites us to ignore the Government's asserted prosecutorial interest in the witnesses. We reiterate our view that a witness' status as an actual or potential target of prosecution always warrants summary rejection of a claim for defense witness immunity. Beyond this, however, Todaro has not presented circumstances that would require serious consideration of use immunity for even a non-target witness.

Todaro relies first on what he characterizes as "the selective use of immunity to gain a tactical advantage." Brief for Appellee at 22. Though this Court has intimated that discriminatory use of immunity to gain a tactical advantage might support a due process claim for defense witness immunity, *United States v. Calvente, supra,* 722 F.2d at 1025, there is no suggestion of this sort of gamesmanship in the record. The number of witnesses immunized by the Government, without more, would not support a finding of this type of misconduct. Todaro's argument, based on conclusory and unsupported allegations of prosecutorial misconduct, is no different than the "equalizing" argument already rejected in *Turkish.*

[5] Nor do we find persuasive Todaro's second argument that this case differs from a standard defense witness immunity claim because *Holland v. United States, supra,* 348 U.S. at 135-36, 75 S.Ct. at 135-36, imposes on the prosecution in a "net worth" case the duty to pursue defense leads as to possible sources of non-taxable income and directs the trial judge to consider the leads as true if the Government fails to show a reasonable investigation into their validity. Todaro contends that the investigation requirement of *Holland* includes an obligation to grant use immunity to "lead" witnesses who invoke their self-incrimination privilege. We disagree.

Holland obliges the Government to pursue only those leads "reasonably susceptible of being checked." 348 U.S. at 136, 75 S.Ct. at 136. That obligation does not require the Government to displace a lawful claim of privilege. The Supreme Court emphasized that it was not within the province of the courts to dictate governmental investigative procedures. *Id.*

Nor do we agree with amici's related suggestion that the order in this case is sustainable as a remedial sanction for the Government's failure to fulfill its *Holland* obligation. The District Court made no finding of a *Holland* violation, and the record would not support such a finding. Finally, any determination of a *Holland* violation, should one occur, and of the need for a remedy other than defense witness immunity should await the close of the Government's case at trial, when the fairness of using the "net worth" method may be assessed on a complete record.

The order of the District Court is reversed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of September, one thousand nine hundred and eighty-four.

Present: HON. HENRY J. FRIENDLY
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. JON. O. NEWMAN
Circuit Judges,

UNITED STATES OF AMERICA,

Appellant,

v. 84-1086

JOSEPH E. TODARO,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk
By: Edward J. Guardaro
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of October, one thousand nine hundred and eighty-four.

UNITED STATES OF AMERICA,

Appellant,

v. 84-1086

JOSEPH E. TODARO,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, Joseph E. Todaro,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA	CR-83-29E
-vs-	
JOSEPH TODARO, SR.	ORDER

The abovenamed individual ("Todaro") having moved for orders compelling the government to grant "use immunity" to one Greico and one Ryding and to divulge to Todaro any evidence regarding any loans made to Todaro by Greico or Ryding or one Marino during the period from June 30, 1975 through June 30, 1978, and the government having submitted for *in camera* inspection its prosecutor's affidavit, and memorandums having been submitted and arguments heard and consideration having been given to legal precedents and of the instant circumstances, and it appearing therefrom that there are conflicting factors of fairness and that there are matters of third persons' privacy and confidentiality which should be observed and that there are apparent non-compliances with the mandates of *Brady v. Maryland,* 373 U.S. 83 (1963), and Fed.R.Crim.P. rule 16, it is hereby

ORDERED that copies of the federal income tax returns of Greico and Ryding and Marino for periods within or overlapping the aforementioned three-year span of time, with everything therein and thereon redacted except the taxpayer identification and tax period and signing date and items showing specific entries for interest income from a loan or loans shall be turned over to defendant and that such copies may be received in evidence when offered by the government or by Todaro; and it is further hereby

ORDERED that it shall be presumed for purposes of this trial that each of Greico and Ryding and Marino was financially able at all pertinent times to have made a substantial loan or loans to Todaro and that the government may not adduce any evidence

showing or tending to show that Greico or Ryding or Marino was at any pertinent time financially unable to have made a substantial loan or loans to Todaro unless Greico or Ryding or Marino shall respectively have been accorded use immunity as to testimony on trial concerning such ability or the making *vel non* of such loan or loans to Todaro; and it is further hereby

ORDERED that any and all evidence which the government possesses or of which it has knowledge regarding any loan or loans made at any pertinent time or times to Todaro by Greico or Ryding or Marino shall be made known to Todaro by the government, forthwith and with a continuing obligation to do so.

Dated: Buffalo, N.Y.
February 7, 1984

John T. Elfvin
U.S.D.J.